Supreme Court of the United States.

No. 393.

OCTOBER TERM, 1905.

COMMONWEALTH OF KENTUCKY, *Appellant*,

vs.

CALEB POWERS.

BRIEF FOR THE APPELLANT ON THE MOTION TO DISMISS THE APPEAL.

STATEMENT OF THE CASE.

The appellee, Caleb Powers, was held for trial in the circuit court of Scott County, Kentucky, on an indictment for the crime, under the laws of Kentucky, of being accessory before the fact to the wilful murder of William Goebel. He was three times tried and convicted, and each conviction was reversed by the court of appeals of Kentucky. Pending his fourth trial he filed a petition for removal of the prosecution into the circuit court of the United States for the eastern district of Kentucky under section 641 of the Revised Statutes of the United States (Rec. 10), and that court, on his application, issued a writ of habeas corpus commanding the jailer of Scott County to deliver him into the custody of the marshal of the federal court for trial therein (Rec. 288).

This is an appeal from the order awarding a writ of habeas corpus, solely upon the question of the jurisdiction of the

court, as a court of the United States, to make the order (Rec. 290). Powers moves to dismiss the appeal upon the ground that the order is not final, and that the remedy of the Commonwealth is by a writ of mandamus, as in Virginia vs. Rives, 100 U. S., 313, and Virginia vs. Paul, 148 U. S., 107.

The Commonwealth, at the same time, presents a petition for writ of mandamus, and respectfully suggests that the motion to dismiss the appeal be postponed to the hearing of the petition for mandamus, so that the whole matter may be disposed of at once. It is immaterial to the Commonwealth whether the remedy is by appeal or writ of mandamus. The important question is whether the circuit court of the United States had jurisdiction to take the custody of Powers from the state court.

The opinion (Rec. 242, 280) shows that the circuit court thought that the judge who presided at Powers' third trial in the state court committed error of law in overruling a challenge to the panel, on that trial, and that the surest way of preventing the judge who might preside at the next trial, in the state court, from committing the same error, if the question should arise again, was to remove the case into the federal court. A writ of habeas corpus was accordingly issued to take Powers from the custody of the state court. Rec. 288. It is not claimed that the statutes of Kentucky providing for the selection of jurors and the trial of criminal prosecutions are repugnant to the Constitution of the United States.

ARGUMENT.

We concede that an order of a circuit court of the United States *remanding* a case to the state court can not be "reviewed by this court, in any manner, either by appeal from the circuit court, or by mandamus to that court, or by writ of error to the state court." It was so held in German National

Bank vs. Speckert, 181 U. S. 405, 408, 409 and in the cases therein referred to. At p. 408 Mr. Justice Gray also said:

"In Chicago Railway vs. Roberts (1891), 141 U. S. 690, the cases of Morey vs. Lockhart and Richmond & Danville Railroad vs. Thouron were followed: and it was held that section 5 of the Judiciary Act of March 3, 1891, c. 517, giving a writ of error from this court "in any case in which the jurisdiction of the court is in issue," does not authorize a writ of error to review an order of the circuit court, *remanding* a case for want of jurisdiction, because such order is not a final judgment."

But the present appeal is not from an order remanding a case to the state court; the Commonwealth made no motion to remand. The appeal is from the order of the circuit court "granting a writ of habeas corpus to take the custody of Caleb Powers from the state court." The petition for appeal and the allowance of the appeal were carefully limited and confined to the "order of the court granting a writ of habeas corpus to take the custody of Caleb Powers from the circuit court of Scott County, Kentucky, solely upon the question of the jurisdiction of the court, as a court of the United States, to make said order and to issue said writ." Rec. 290.

We submit that the order so appealed from was final. As between Powers and the Commonwealth it took him finally and forever from the jailer of Scott County and from the custody of the state court. It discharged him absolutely from that custody, no matter whether he should thereafter be acquitted or convicted in the federal court. In neither event would he be returned to the custody of the commonwealth. His discharge therefrom was absolutely complete and final. If the circuit court of the United States was without jurisdiction to make the order, the right to review it on the question of jurisdiction, under section 5 of the act of March 3, 1891, c. 517, ought not, therefore, to be denied on the ground that the order is not final. No one would doubt its finality

it it were made on an independent petition for writ of habeas corpus.

If there is any objection to the appeal it must rest on the ground that the order was not made on a separate proceeding in habeas corpus, but as ancillary to a proceeding for removal; but that is not a conclusive objection. The question of Powers' guilt or innocence of the crime for which he was indicted is one thing. The question of the right of the Commonwealth to hold him for trial, although collateral, is distinct, whether raised in a separate proceeding for a writ of habeas corpus, or on an application for such writ made in the criminal prosecution. The principle is analagous to that recognized in the following cases.

Trustees vs. Greenough, 105 U. S. 527, 531.
Williams vs. Morgan, 111 U. S. 684.
Hill vs. Chicago & Evanston Railroad Co. 140 U. S. 52.
Salmon vs. Mills, 66 Fed. (C. C. A. 8th Cir.)

In Trustees vs. Greenough, 105 U. S. 527, an appeal was sustained from a decree directing that the complainant be paid his costs and expenses out of the fund in court. Mr. Justice Bradley said:

"The first question, however, is whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision."

In Salmon vs. Mills, 66 Fed. 32, a writ of error was sustained from an order dissolving an attachment.

From a similar order, on the removal of a criminal prosecution, from a state court, an appeal was allowed in Carico

vs. Wilmore, County Jailor, 51 Fed. 200, 202, but was not prosecuted, as appears from the statement of Mr. Justice Gray in Virginia vs. Paul, 148 U. S. 107, 111, 112.

An appeal lies directly to this court in a proceeding in habeas corpus if the case comes within section 5 of the act of March 3, 1891.

In re Lennon, 150 U. S. 392.
Rice vs. Ames, 180 U. S. 371.

The question of jurisdiction is duly certified (Rec. 290) in accordance with the practice approved in Shields vs. Coleman, 157 U. S. 168.

Respectfully submitted,

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